NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

In the Interest of S.V.B., a child.

K.G.,

Appellant,

v.

Case No. 2D11-2564

DEPARTMENT OF CHILDREN AND FAMILY SERVICES and GUARDIAN AD LITEM PROGRAM,

Appellees.

Opinion filed April 20, 2012.

Appeal from the Circuit Court for Hillsborough County; Vivian T. Corvo, Judge.

Linda C. Clark of Linda C. Clark, P.A., Tampa, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kimberly G. Gore, Assistant Attorney General, Tampa, for Appellee Department of Children & Family Services.

Jennifer S. Paullin, Tavares, for Appellee Guardian ad Litem Program.

LaROSE, Judge.

K.G., mother of the minor child, S.V.B., appeals the order terminating her parental rights. We review the trial court's order to determine whether competent, substantial evidence supports it. R.C. v. Dep't of Children & Family Servs., 33 So. 3d 710, 714 (Fla. 2d DCA 2010). The record contains competent, substantial evidence that the mother engaged in egregious conduct toward the child under section 39.806(1)(f), Florida Statutes (2010). Finding no error, we affirm.

K.G., the child, and the child's father[1] went out to dinner. Apparently otherwise healthy, the three-month-old child was extremely fussy because it was late and she was hungry. The father was frustrated by the child's condition. On the way home after dinner, they stopped to shop. K.G. went inside a store while the father remained in the car with the child. The child remained fussy and was crying. The father testified that he became frustrated and moved to the back seat to feed the child. The child continued to cry. K.G. was in the store for no more than ten minutes. Upon returning to the car, she saw the father standing outside the car, holding the child and talking on a cell phone. The father testified that the child started to "breathe funny" while he was feeding her; he called 911.

At the hospital, physicians discovered severe injuries. The child's fontanel, the "soft spot" between the bones of a young baby's skull, bulged. A CAT scan revealed a subdural hematoma.[2] Doctors performed an emergency craniotomy.

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[1]K.G. and the father were previously married to each other.

[2]Subdural hematoma, also known as subdural hemorrhage, is a localized mass of clotting blood that has exuded from a vessel into the tissues surrounding the brain. Stedman's Med. Dictionary 144180, 175540, 178110 (27th ed. 2000).

Additional testing revealed that the subdural hematoma was an acute bleed. Retinal hemorrhaging and retinal folds presented in both eyes. The child suffers vision problems due to the injuries. The long-term effects on her development remain unknown.

The Department of Children and Family Services (DCF) sheltered the child and filed a dependency petition. Because of the seriousness of the injuries, DCF later filed a petition to terminate the parental rights (TPR) of both parents. The treating physician, Dr. Brooks, a pediatric emergency medicine and child abuse expert, testified at the hearing. He diagnosed abusive head trauma—someone violently shook the child. He opined that the injuries were inflicted within minutes of the 911 call. Dr. Alexander, one of only seven Florida physicians board certified in child abuse pediatrics, testified that the child's medical history indicated neither chronic hematoma nor any other brain disorder. He concluded that the child's condition at the emergency room could not have manifested spontaneously. He, too, concluded that someone had shaken the child.

The father provided expert medical testimony that the subdural hematoma was not caused by shaking the child. Rather, the doctor asserted that it began with a prior unrecognized injury weeks or months earlier—likely at birth—and rebled acutely but spontaneously that night. The trial court found this testimony incredible. A biomechanics expert in reconstructing automobile accident injuries testified that it was physically improbable that someone could shake a child so violently that it would cause such an injury. The trial court found this testimony irrelevant and "completely non-persuasive to the facts of this case."

K.G. testified that she did not believe anything was wrong with the child. She denied that the father caused the injuries. She refused to believe that he would

ever harm the child. Yet, K.G. acknowledged that she asked the father if he had shaken or hurt the child. She admitted that they argued about the cause of the injuries. K.G. also tried to obtain a security video of the incident from the store. Obviously, K.G. questioned how her child went from healthy to severely injured in a ten-minute span. Despite her doubts, K.G. maintains her relationship with the father and plans to remarry him. He is her sole financial support.

The trial court found that the father injured the child. The trial court found that K.G.'s conduct was egregious and that termination of her rights was the least restrictive means to protect the child. The trial court issued an order terminating K.G.'s and the father's parental rights. We affirmed the order as to the father. A.B. v. Dep't of Children & Family Servs., 73 So. 3d 768 (Fla. 2d DCA 2011) (unpublished table decision). The maternal grandparents have custody of the child.

K.G. argues that there is insufficient evidence of egregious conduct. She claims that the father never showed frustration or anger toward the child. K.G. also points to the conflicting medical testimony about the cause of the injuries. Instead of termination, K.G. wants a case plan with a goal of reunification. For the well-being of this child, we cannot agree with K.G.

Termination of parental rights is appropriate when "[t]he parent or parents engaged in egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct that threatens the life, safety, or physical, mental, or emotional health of the child or child's sibling." § 39.806(1)(f). Egregious conduct is "abuse, abandonment, neglect, or any other conduct that is deplorable, flagrant, or outrageous by a normal standard of conduct." § 39.806(1)(f)(2). It may include an act or omission that occurred only once but was so severe that it endangered

the child's life. Id. Section 39.809(1) requires DCF to prove each element necessary to terminate parental rights by clear and convincing evidence. R.P. v. Dep't of Children & Family Servs., 975 So. 2d 435, 436 (Fla. 2d DCA 2007). We will not overturn a trial court's determination that such evidence is clear and convincing unless we can say " 'as a matter of law that no one could reasonably find such evidence to be clear and convincing.' " Id. (quoting L.B. v. Dep't of Children & Families, 835 So. 2d 1189, 1194 (Fla. 1st DCA 2002)); see also I.D. v. Dep't of Children & Families, 13 So. 3d 1117, 1119 (Fla. 3d DCA 2009) (stating standard of review for termination of parental rights for egregious conduct is whether competent, substantial evidence supports the order (citing R.P., 975 So. 2d at 436)).

K.G. refused to acknowledge that the child suffered injuries from which she likely will never fully recover. Faced with Dr. Brooks' and Dr. Alexander's opinions, the apparent frustration displayed that night by the father over the child's fussiness, and her own doubts, K.G. has refused to recognize the father's conduct. K.G. made clear that she will continue her relationship with the father and will remarry him. K.G. has placed her self-interest above the well-being of the child. The trial court had ample evidence to conclude that K.G. will not protect the child from the person who caused the severe injuries. The evidence of egregious conduct was clear and convincing. See R.P., 975 So. 2d at 436.

Because K.G. engaged in egregious conduct, DCF is not required to make efforts to reunify the family. See § 39.806(2). The trial court did not err in terminating K.G.'s parental rights.

Affirmed.

BLACK, J., Concurs.
DAVIS, J., Dissents with opinion.

DAVIS, Judge, dissenting.

I respectfully dissent. In my opinion, this record fails to include competent, substantial evidence that supports the trial court's finding that K.G.'s conduct was egregious. See I.D. v. Dep't of Children & Families, 13 So. 3d 1117, 1119 (Fla. 3d DCA 2009) ("The standard of review where a trial court terminates parental rights on the basis of egregious conduct . . . is whether the order is supported by competent substantial evidence."). Accordingly, I would reverse and remand for the entry of an order of dependency as to K.G. and require that she be offered a case plan that may lead to reunification.

The trial court's final judgment terminating K.G.'s rights to the child included the following finding as to K.G.'s egregious conduct:

> [G]rounds for termination in this case were established because . . . the Mother has the opportunity and capability to prevent exposure of the child to the egregious conduct of the Father. This conduct has, in the past, proven to threaten the life, safety, physical, mental, and emotional health of the child . . . . The Mother is found to have knowingly failed to protect the child by refusing to accept the evidence of the child's injury or to go against the Father in this cause of action.

The record before this court, however, simply does not support this finding. Initially, I note that DCF did not present any evidence below to show that K.G. was on notice prior to this incident that she needed to protect the child from the father. The testimony established that K.G. was not present when the child's injuries were inflicted. And nothing in this record suggests that prior to the subject incident K.G. was

aware of any indication that the child's father had a propensity to injure the child.[3] As such, the trial court's finding that K.G. "knowingly failed to protect the child" from the father can only be referring to her continued belief that the father was not responsible for the child's injuries. Any failure to protect, therefore, is prospective rather than a suggestion that the instant injuries to the child were the result of K.G.'s having the "opportunity and capability" to prevent the injuries but failing to do so. See § 39.806(1)(f), Fla. Stat. (2010).[4]

However, just as there is no evidence in the record to suggest that K.G. could have but failed to prevent the instant injuries to the child, I conclude that the evidence does not support the determination that K.G.'s accepting the father's denial of hurting the child rises to the level of egregious conduct. Egregious conduct is defined by statute as conduct that is "deplorable, flagrant, or outrageous by a normal standard of conduct." § 39.806(1)(f)(2).

Here, K.G.'s decision to believe the child's father's claims of innocence must be viewed in light of the fact that, according to this record, the father had never done anything to the child or K.G. that would put K.G. on notice that he was a danger to the child. Instead, we have a factual scenario arising wherein K.G. leaves a fussy three and one-half-month-old infant with the father in the car in the parking lot of a store while

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[3] Cf. D.O. v. S.M., 981 So. 2d 11 (Fla. 4th DCA 2007) (affirming termination as to mother on grounds of egregious conduct where both parents were child's only caregivers and thus both necessarily were present during the abuse and where even if mother did not herself inflict the abuse, she was aware that father had history of domestic violence and child was displaying manifestations of repeated abuse over a five-week period yet mother did not seek medical attention or remove child from the home).

[4] This is also the conclusion by the majority opinion: "The trial court had ample evidence to conclude that K.G. will not protect the child from the person who caused the severe injuries."

she goes in to shop. Upon her return ten minutes later, the child is in distress. At the hospital, the doctors advise K.G. that the infant has been severely shaken and has serious brain injuries. The father denies that he harmed the child, and K.G. is faced with a horrible dilemma: should she believe the father of her child in his protestations of innocence or should she accept the doctor's findings that the child has been abused when she knows the father to be the only one with the opportunity to inflict such abuse.

According to the testimony, the child's injuries caused conflict between K.G. and the father. K.G. went to the store to determine if the store's surveillance video might provide some answers, but she was unable to obtain a videotape. The videotapes unfortunately were inconclusive. The majority suggests that K.G.'s investigation of the incident evidences egregious conduct on her part because she obviously questioned the father's innocence yet ultimately determined that she would continue her relationship with him. I, however, would suggest that by questioning the father's story and attempting to obtain all the information she could about the incident, K.G. exhibited the commitment she had to her child and to discovering the truth about what happened to her. Taken by itself, this investigation fails to establish clear and convincing evidence of egregious conduct.

Then, prior to trial, the father produced three experts who supported his claims of innocence. A radiologist testified that in his opinion, his examination of the child's brain scan revealed injuries of three different ages, including one that would have been from five to seven days old. An expert in biomechanics testified that in his opinion, these injuries could not have resulted from the severe shaking of the child and that in essence, he questioned the whole area of shaken baby syndrome. Finally,

another medical doctor testified that the child's injuries were a "rebleed" of a preexisting condition. He too questioned the shaken baby syndrome reasoning.

Faced with the claims of innocence from the child's father, the lack of any indication from the past that the father would commit such an act, and three experts who supported the father's innocence—two of whom are medical doctors and one who has earned a Ph.D. in a related field—K.G. proceeded to trial accepting as true the father's declaration of innocence. In doing so, K.G. also accepted the experts' opinions that the child was not injured by a shaking but that the injury was the result of a preexisting condition. It is this reliance on these three experts that the trial court and the majority find to be egregious conduct on the part of K.G. I must disagree.

In doing so, I do recognize that the trial court did have before it expert testimony that contradicted the father's experts and that it chose to disregard the father's experts' testimony. I also recognize that such a weighing of the evidence is perfectly within the purview of the trial court in making the determination of whether the <u>father's actions</u> amounted to egregious conduct. However, I reject the conclusion that K.G.'s failure to completely ignore the opinions of the father's three expert witnesses prior to the trial court's determination of their value amounts to "deplorable, flagrant, or outrageous" conduct. I would conclude instead that the record fails to provide competent, substantial evidence to support the trial court's finding of egregious conduct by K.G., and I would reverse the final judgment of termination. I also would note that with the trial court's determination of the "guilt" of the father and K.G.'s potential for choosing to disregard that finding by the trial court, a dependency order may be appropriate with the provision of a case plan for K.G. that would include a requirement that she prevent the father's further contact with the child.